Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: E.L. Enterprises, Inc.

File: B-271251.2

Date: July 22, 1996

Reggy Gray for the protester.
Terrence J. Tychan, Department of Health and Human Services, for the agency.
Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The Buy Indian Act confers broad discretion on contracting officials to set aside procurements for exclusive participation of Indian firms when practicable, but does not require that particular contracts be set aside for Indian firms; protest that procurement should have been restricted to Indian firms is denied where contracting officials did not abuse discretion.

2. Solicitation provision is not unduly restrictive of competition where it's inclusion is mandatory under the Federal Acquisition Regulation and, in any case, it does not preclude the protester from competing.

DECISION

E.L. Enterprises, Inc. protests the terms of request for proposals (RFP) No. 246-96-R-0002, issued by the Oklahoma City Area office of the Indian Health Service (IHS), Public Health Service (PHS), Department of Health & Human Services (HHS), for dental management services and general dental services for Indian clients in Oklahoma and parts of Kansas and Nebraska.

We deny the protest.

The RFP contemplates award of a fixed-price, requirements contract for three types of services: (1) claims processing and report generation related to dental services provided at IHS facilities by dentists performing under a pre-existing contract unrelated to this protest (fee-for-clinic services); (2) claims processing and report generation related to dental laboratory services provided under a pre-existing contract unrelated to this protest; and (3) general dental services (including claims processing and report generation) to be provided through a network of dentists under contract to the successful offeror, in response to referrals made by IHS facilities (fee-for-service services).

Both technical and business proposals are required, award to be made to the responsible offeror whose proposal represents the best value to the government. ELE filed this protest on April 12, 1996. Proposals were due on April 15; ELE did not submit a proposal.

SET-ASIDE

ELE argues that the agency's failure to set this procurement aside exclusively for Indian-owned concerns constituted an abuse of discretion.

The Buy Indian Act, 25 U.S.C. § 47 (1994), establishes Indian preferences and confers broad discretionary authority to negotiate exclusively with Indian contractors. However, it leaves set-aside decisions to the discretion of the agency, and does not require particular procurements to be set aside. Indian Resources Int'l, Inc., B-256671, July 18, 1994, 94-2 CPD ¶ 29.[1] Accordingly, our Office will review set-aside decisions only where there is a prima facie showing of a possible abuse of discretion. See Adams Mechanical, B-235280, May 11, 1989, 89-1 CPD ¶ 447.

ELE asserts that the agency abused its discretion here in that it failed to make a good faith effort to locate qualified Indian firms and wrongly found ELE and another Indian firm, ESTE Medical Services, Inc., unqualified. This argument is without merit.

The agency clearly made a reasonable effort to identify potential Indian concern offerors. IHS published a "sources sought" synopsis in the November 27 edition of the Commerce Business Daily (CBD). One Indian firm, ESTE, responded, but the capability statement provided by the firm showed that the firm had a limited corporate history and had never provided dental services. IHS was also aware of ELE's interest in the contract, but determined that ELE also was not a viable prospective offeror since it too had never provided dental services. IHS also consulted the "Oklahoma City Area Indian Health Service Buy Indian Certified Firms List," dated October 3, 1995, which is a list of qualified Indian firms in different service categories; no Indian firms were listed as qualified dental services providers. Based on these factors, contracting officials determined that there was no Indian firm that could meet the requirements, and hence issued the RFP as unrestricted.

ELE's real argument seems to be that, since the agency was aware that ELE was a provider of "government services" under prior contracts, the agency should have

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[1]PHS regulations currently provide only that IHS will give preference to Indian concerns when "practicable." 48 C.F.R. § PHS 380.501(a).

considered whether ELE also could provide dental services. However, it is not an abuse of discretion for an agency to decide that an Indian concern set-aside is not warranted where there are no Indian concerns that have provided the services required; indeed, we would question the reasonableness of a decision to set a requirement aside for Indian firms under these circumstances.

UNDULY RESTRICTIVE PROVISION

ELE objects to the inclusion in the RFP of the clause at Federal Acquisition Regulation (FAR) § 52.222-46, entitled "Evaluation of Compensation for Professional Employees (Feb 1993)" (RFP clause L.19), which states, in pertinent part, as follows:

> "(b) . . . proposals envisioning compensation levels lower than those of predecessor contractors for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted, high-quality work, and availability of required competent professional service employees. Offerors are cautioned that lowered compensation for essentially the same professional work may indicate . . . lack of understanding of the requirement.
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> . . . . .
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> "(d) Failure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal."

ELE maintains that this provision gives the incumbent contractor an improper competitive advantage by essentially precluding the underbidding of the incumbent.

The FAR expressly requires that this provision be included in solicitations for negotiated service contracts when the contract amount is expected to exceed $500,000 and the service to be provided will require meaningful numbers of professional employees, as in this case where the services of many dentists will be provided. FAR § 22.1103; Relief Servs., Inc.; Radiological Physics Assocs., Inc., B-252835.3; B-252835.4, Aug. 24, 1993, 93-2 CPD ¶ 116. We thus have no basis for objecting to its inclusion here. In any case, we find nothing improper in a clause putting offerors on notice that proposing reduced compensation for professionals will be viewed negatively in the evaluation; such reduced compensation reasonably relates to the agency's legitimate interest in ensuring that the successful offeror will

be able to attract and retain the high quality professionals necessary to provide quality services, and thus reflects on the offeror's understanding of the requirement. See Research Management Corp., 69 Comp. Gen. 368 (1990), 90-1 CPD ¶ 352.[2]

RFP AMBIGUITIES

ELE contends that the RFP contains numerous inconsistencies, ambiguities, unclear terms, and otherwise does not clearly convey the government's requirements. ELE claims that these deficiencies should be corrected and the closing date further extended in order that ELE can prepare its proposal in view of the anticipated corrections.

While the RFP perhaps could have been written more clearly in some areas, we find no material RFP deficiencies. For example, ELE maintains that, as a result of changes made by amendment No. 03, the RFP is unclear as to whether offerors are to furnish prices for the fee-for-clinic services and dental laboratory services, or prices only for the processing of claims and the generation of reports related to those two services. However, section C-4 of the work statement, added by amendment No. 02, clarifies this matter, stating clearly that the contractor is to provide only claims processing and report generation for the fee-for-clinic services and dental laboratory services. Furthermore, the pricing schedules added by amendment No. 03 (pages 44 and 45) clearly demand prices only for the clerical work, not the actual dental services; this is the only reasonable interpretation of the RFP.

As another example, ELE maintains that section F-2 (b), paragraph 3, is unclear. That paragraph states:

> "To insure continuous access dental care throughout the contract period, the cumulative disbursed amount shall not exceed twenty-five percent of the total contract amount allotted for direct services per fiscal quarter nor at any time exceed the total allocated funds unless overall adjustments are indicated and supported by the Contracting Officer's Representative."

This provision is unambiguous; it clearly states that only 25 percent of the contract funds will be expended per fiscal quarter without approval by the agency. ELE seems to assert that the provision is deficient because it does not explain how the

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[2]ELE also objects to the requirement in FAR § 52.222-46 that offerors provide a detailed professional employee compensation plan. Again, however, this provision is required to be included in the RFP here.

contract would proceed if services provided during a fiscal quarter exceeded 25 percent of the contract funds. However, we think it is clear that this would become a matter for negotiation between the agency and the contractor. We see nothing improper or ambiguous in the agency's leaving such performance problems to be resolved during performance. RFPs need not be drafted in such detail as to eliminate completely any risk or remove every uncertainty for offerors or the contractor; risks are inherent in procurements, and offerors are expected to use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. National Customer Eng'g, B-254950, Jan. 27, 1994, 94-1 CPD ¶ 44.[3]

INSUFFICIENT RESPONSE TIME

ELE states that, on April 8, it received Amendment 05, which made changes and extended the closing date to April 15. ELE complains that 7 days was insufficient time to incorporate the changes and submit a proposal.

Contracting officers are vested with discretion to determine whether and to what extent closing date extensions are necessary. FAR § 15.410; Systems 4, Inc., B-270543, Dec. 21, 1995, 95-2 CPD ¶ 281. We will not disturb a contracting officer's decision in this regard unless it is shown to be unreasonable or the result of a deliberate attempt to exclude the protester from the competition. Systems 4, Inc., supra.

There has been no such showing. Amendment No. 05 made two changes to the RFP: (1) the correction of a telephone number for a contact person knowledgeable about the IHS data processing system; and (2) a clarification that prices for specified difficult-to-price procedure codes would not be evaluated. It is not apparent--and ELE has not shown--why any substantial additional proposal preparation time would be needed based on these minor changes. In any case, the

[3]ELE argues that it should be reimbursed its proposal preparation costs due to the numerous deficiencies in the RFP and solicitation process (for example, not allowing offerors sufficient time to respond to solicitation changes). Since ELE did not submit a proposal, and given our conclusion that the RFP is not materially deficient, there is no basis for finding ELE entitled to these costs. 4 C.F.R. § 21.8 (1996).

agency was not required to extend the closing date solely to accommodate ELE, and there is no evidence that the agency was motivated by a desire to exclude ELE from the competition.[4]

The protest is denied.

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[4]ELE maintains that the agency's refusal to set the requirement aside and eliminate RFP deficiencies was motivated by its desire to retain the incumbent contractor. Contracting officials are presumed to act in good faith. Thus, in order to establish bad faith, a protester must submit convincing proof that contracting officials intended to harm the protester. Indian Affiliates, Inc., B-243420, Aug. 1, 1991, 91-2 CPD ¶ 109. ELE's bare allegations do not meet this burden.